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In the Supreme Court of the United States

OCTOBER TERM, 1957

SIDNEY J. MASSICOT, ROBERT R. LIRETTE AND JAMES F. DONNELLY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1041

SIDNEY J. MASSICOT, ROBERT R. LIRETTE AND JAMES F. DONNELLY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 25–39) is reported at 254 F. 2d 58.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1958 (R. 543). A petition for rehearing was denied on May 8, 1958 (R. 571). The petition for a writ of certiorari was filed on June 2, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether 47 U. S. C. 605, which forbids the interception and divulgence of a telephone communication, defines a crime.

2. Whether a statement incorporating petitioner Donnelly's confession, which he admitted was true but did not sign, was admissible.

3. Whether petitioners Massicot and Lirette were prejudiced by newspaper, radio, and television reports to the effect that petitioner Donnelly's confession implicated all of the petitioners.

STATUTE INVOLVED

47 U. S. C. 605 provides in pertinent part:

> * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *

STATEMENT

Petitioners were charged with jointly intercepting and divulging three telephone communications, in violation of 47 U. S. C. 605, by an indictment filed July 12, 1956, in the United States District Court for the Eastern District of Louisiana (R. 2–3). Petitioners were found guilty as charged by a jury on January 30, 1957 (R. 474, 477). On February 13, 1957, petitioners Lirette and Donnelly were sentenced to concurrent terms of one year imprisonment on each count. Petitioner Massicot was sentenced to concurrent terms of imprisonment for one year, and a $10,000 fine on count one (R. 490, 506). The Court of Appeals affirmed, one judge dissenting without opinion.

The facts may be stated as follows:

1. Mr. deLesseps S. Morrison, the Mayor of New Orleans, Louisiana, was a candidate for Governor of Louisiana in the 1956 election. On Tuesday, January 17, 1956, the date of the gubernatorial primary election, Mr. Morrison was at home listening to the election returns (R. 22–23, 25). During the course of the evening Mr. Morrison had telephone conversations with Mr. David McGuire (count 2), Mr. Claude Kirkpatrick (count 3), and his wife, Mrs. Corinne Morrison (count 4) (R. 19–20, 23, 27). These particular calls were intrastate calls. The telephone which Mr. Morrison used was his usual residence telephone on which he had often received interstate calls. He did not authorize anyone to intercept them (R. 25, 26–27, 28, 36, 196–197), nor did the other parties to these conversations authorize their interception (R. 46, 57, 63).

On January 18, 19 or 20, 1956, petitioner Massicot played a wire recording of Mr. Morrison's telephone conversations in the hotel suite of Governor Earl Long, the successful gubernatorial primary candidate (R. 69–71, 72–74, 78, 87–88, 93–94). Four to six people were present at the time of the play-back, including Governor and Mrs. Earl Long (R. 76, 78, 100–101). Petitioner Massicot also discussed the method used to intercept telephone communications (R. 75–76).

Within a few days word came back to Mr. Morrison that his telephone had been tapped and that some of his recorded telephone conversations were being circulated (R. 36). Police and telephone company investigation revealed that the Mayor's tele-

phone line had been tapped at the terminal box on the service pole outside the house (R. 147, 172–173, 197). A service wire which had formerly provided normal telephone service through the same terminal box to Apartment G, 1328 Felicity Street—which was diagonally across the street from the Mayor's home—had been shifted so as to funnel Mr. Morrison's telephone calls to Apartment G, as well as to the Mayor's home (R. 174–176, 178, 185–186, 196–200, 220–223).

On January 14, 1956, petitioner Lirette had rented Apartment G, 1328 Felicity Street, using the name "Sirette" (R. 161, 232–235, 251–252). He occupied the apartment for four nights only; that is, until the day after the primary election (R. 237, 239, 245–246). On one occasion during this period, while entering the apartment in the company of another person, either petitioner Lirette or his companion was heard to say, "I am glad you brought the recorder" (R. 236).

During the period of these offenses petitioner Massicot operated the United Detective Agency in New Orleans. Petitioner Lirette was a full-time employee of the agency and petitioner Donnelly a part-time employee. All three had obtained commissions as special police officers from the New Orleans Police Department at petitioner Massicot's request (R. 121–123, 133–138, 148; Govt. Ex. 1–8). Petitioner Donnelly also worked full-time for the Southern Bell Telephone and Telegraph Company as an installer-repairman. He was absent from his regular employment from January 10 through 22, 1956, because of "illness" (R. 261–262, 264–265).

2. During a hearing held by the trial judge in the absence of the jury (R. 296) to determine the admissibility of petitioner Donnelly's confession the following facts were developed:

Petitioner Donnelly was interviewed twice by F. B. I. agents Carson and Griffin, on April 25 and 26, 1956 (R. 270, 297–298). The first interview took place in a parking lot in New Orleans during the afternoon (R. 297). The agents identified themselves and told petitioner Donnelly the subject of their inquiry (R. 329). Donnelly was not placed under arrest and he was informed that he could leave at any time (R. 308). Initially, Donnelly denied having any knowledge concerning the wiretap. After pondering the matter over a cup of coffee, however, he admitted that he had installed the wiretap on Mayor Morrison's telephone (R. 321).

The following day, Donnelly met the agents at the local F. B. I. office (R. 309). He was advised that he had a right to remain silent; that he was entitled to consult an attorney; that he could terminate the interview at any time; and that it was an offense to give a false statement (R. 298, 310–311, 324). Donnelly's oral disclosures of the previous afternoon—as clarified by questions asked of him at the second interview—were then reduced to writing in his presence and with his participation (R. 298, 309–310, 314, 325, 394–395). After the statement had been typed, Donnelly read it and indicated that it was completely true, but declined to sign the statement until after discussing it with his attorney (R. 302–303, 310, 315–316). He mentioned that between the two interviews

he had talked to an attorney about giving a statement and wanted to show the statement to the attorney (R. 335). Donnelly was then given a copy of the statement. Two days later he declined, on the recommendation of his counsel, to sign the document (R. 303, 315). At that time, however, he again admitted that the statement was true (R. 316). No force or threat of physical violence, no reward or promise of immunity, was used to induce the giving of a statement (R. 298–299, 308, 324–325).

Donnelly testified for the purpose of contesting the admissibility of the pretrial statement (R. 341). He testified that the F. B. I. agents told him that he could be sentenced to five years imprisonment if he did not answer their questions truthfully (R. 342–343), and that he refused to sign the statement because there were portions of it "that I wasn't sure about", and other portions that were not true (R. 346). He denied participation in the formulation of the statement and denied that he told the agents that the statement was true (R. 345, 347, 362). Donnelly admitted, however, that he was not mishandled in any way (R. 354); that the agents told him that he was entitled to consult an attorney (R. 343); and that he was told that anything he said could be used against him (R. 345).

The trial judge ruled that the pretrial statement was voluntarily given and admissible in evidence (R. 367). Those portions of the statement which related to petitioners Massicot and Lirette were deleted (R. 368–369), and the expurgated version was read to the jury (R. 400–403, 417).

After the jury had returned to the courtroom (R. 369), the prosecution presented all of the evidence which it had earlier offered on the issue of admissibility (R. 369–393), plus the testimony of the stenographer to whom the statement had been dictated and who had then transcribed the dictation (R. 393, 398). When Donnelly's pretrial statement was offered in evidence, defense counsel objected that the statement was not voluntary and was unsigned, but Donnelly did not testify before the jury (R. 399–400).[1]

3. On January 29, 1956, the second day of trial, the Assistant United States Attorney trying the case gave a statement to a local newspaper in which he said that petitioner Donnelly's confession definitely involved the other two petitioners (R. 414–415). An article incorporating this statement appeared in the newspaper's final edition on that day (R. 414). As of the time when this article appeared, Donnelly's pretrial statement, with references to the other petitioners deleted, had been admitted in evidence and the government had rested its case. (R. 368–369, 402). The following morning defense counsel moved for a mistrial and asked the trial court[2] to interrogate the jurors to learn if they had seen this article (R. 413). The trial judge instructed the jury that petitioner Donnelly's state-

[1] In the course of his instructions the trial judge told the jurors that the agents testified that petitioner Donnelly had made a pretrial statement (R. 419) and that the jurors should satisfy themselves that any admissions in the statement were voluntarily made and then give the statement such weight as they believed it deserved (R. 470).

[2] Defense counsel expressly stated that "Of course, we can't ask the Jury any questions, * * *." (R. 413).

ment could be used only against Donnelly and had no bearing on the guilt or innocence of the other petitioners. Next, he ascertained that only one of the jurors had seen part of the newspaper article and that that juror had not read the statement attributed to the prosecutor (R. 419–420). On this basis, the judge overruled the motion for a mistrial (R. 420).

In support of a supplemental motion for a new trial filed February 6, 1957 (R. 482–483), it was stipulated that the gist of the prosecutor's statement to the effect that Donnelly's confession implicated all three petitioners was repeated in two or three spot news broadcasts over a New Orleans television station between 6:55 a. m. and 8:55 a. m., January 30, 1957, the third and last day of trial. It was also stipulated that this information was included in a news broadcast over a New Orleans radio station at 10:00 p. m., January 29, 1957 (R. 487–489).

The trial court called the former jurors as witnesses at the hearing held on the motion. In response to questions, each testified that he had not heard either the radio or television news broadcasts (R. 492–494). The judge asked defense counsel if they wanted any further questions to be put to the former jurors but denied them permission personally to cross-examine (R. 494–495). The motion for a new trial was thereafter overruled (R. 504).

ARGUMENT

1. Petitioners' claim that 47 U. S. C. 605 prescribes a rule of evidence and does not define a crime is answered by the statutes. Section 605 provides, *inter alia*, that "no person not being authorized by the

sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person"; and 47 U. S. C. (Supp. V) 501 provides a punishment of fine and imprisonment for any person who does any act prohibited by the chapter of which Section 605 is a part. This Court has neither erred nor spoken inadvertently in concluding, not once but many times, "that Section 605 is penal in nature" and extends "criminal liability to conduct" of the kind shown by this record. *Rathbun* v. *United States,* 355 U. S. 107, 111; *Benanti* v. *United States,* 355 U. S. 96, 102–103; *Schwartz* v. *Texas,* 344 U. S. 199, 201; *Weiss* v. *United States,* 308 U. S. 321, 329; *Nardone* v. *United States,* 308 U. S. 338, 340; *Nardone* v. *United States,* 302 U. S. 379, 381.

Congress, by enacting Section 605, decided that it was a crime to intercept and divulge telephone messages without authorization. Thereafter it was for this Court to say—and it did say—to what extent evidence obtained by officers in violation of this statute would be admissible in federal courts. *Nardone* v. *United States, supra,* 302 U. S. at 382; *Nardone* v. *United States, supra,* 308 U. S. at 340. But this did not make Section 605 any less a criminal statute. It forbids certain conduct, and traditional criminal penalties attach to its breach. *United States* v. *Gruber,* 123 F. 2d 307, 309 (C. A. 2).

In *Weiss* v. *United States, supra,* 308 U. S. 321, 329, this Court held that intrastate as well as interstate communications were protected against interception and divulgence by the second clause of Section 605.

In *Benanti* v. *United States, supra,* 355 U. S. 96, 103–106, it was held that by enacting Section 605 Congress had so preempted the communications field as to nullify a state law purporting to authorize wiretapping by certain persons and under certain conditions. Petitioners' contention (Pet. 11) that, if Section 605 defines any crime, it must be restricted to the interception and divulgence of interstate communications, thus has already been answered by this Court. As noted in *Benanti,* 355 U. S. at 105, "the intercepter cannot discern between the two and will listen to both [intra and interstate communications]", if the protection of Section 605 is not extended to all telephone communications.

2. Contrary to the contention (Pet. 21) that Donnelly's confession was not true, but was only a carefully selected group of answers which were edited and rewritten into a narrative text by the F. B. I. agents, and therefore inadmissible (Pet. 23), there was ample evidence that Donnelly supplied the information set out in the statement, participated in its dictation, made corrections during the course of dictation, read the statement after it was typed, and then admitted that the statement was true (see *supra,* pp. 5–6). There was thus a substantial basis for the trial court's conclusion that the statement was admissible as having been voluntarily given by Donnelly.

When F. B. I. agents Carson and Griffin first met Donnelly on April 25, 1956, they identified themselves and told him the nature of the inquiry. They then asked him specific questions about the wiretap installation. Donnelly at first denied all knowledge of the

matter but requested time to think over the situation. After a respite from questioning he admitted the principal facts which were set forth in the written statement the following day. See the Statement, *supra*, p. 5. Petitioners argue that the agents should have included Donnelly's prior exculpatory statements [3] in the typewritten document, but the agents surely had no duty to record as part of his statement the earlier assertions which he later abandoned.

Essentially, petitioners ask this Court to reevaluate the circumstances surrounding Donnelly's confession and infer that he refused to sign the statement because it was not true. But petitioners were given a full and fair opportunity to show that at trial in the absence of the jury, *United States* v. *Carmignan*, 342 U. S. 36, 38, attempted to do so, and were not able to persuade the trial judge that the government's contrary evidence should be disregarded. There is no occasion to disregard the decision of the trial court which the Court of Appeals affirmed. Cf. *Thomas* v. *Arizona*, No. 88, Oct. Term, 1957, decided May 19, 1958; *Payne* v. *Arkansas*, No. 99, Oct. Term, 1957, decided May 19, 1958; *Brown* v. *Allen*, 344 U. S. 443, 458; *Lyons* v. *Oklahoma*, 322 U. S. 596, 602–603; *Lisenba* v. *California*, 314 U. S. 219, 238.

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[3] Agent Carson took notes during the first conversation with Donnelly and therein included Donnelly's exculpatory statements. Although petitioners give a prominent place in their brief (Pet. 22) to their trial request that the notes be produced, and cite *Jencks* v. *United States*, 353 U. S. 657, they nowhere mention the further fact that the notes were produced by the government (R. 319) and used by defense counsel during cross-examination (R. 320–321).

3. As noted, *supra*, p. 6, all mention of petitioners Massicot and Lirette was deleted from petitioner Donnelly's confession before the confession went to the jury. Later that day a statement attributable to the prosecutor to the effect that the confession implicated all three petitioners appeared in an article in the local newspaper. Interrogation of the jury revealed that one of the jurors had seen the article but none of them had read the statement which came from the government attorney. Several days later, testimony from the jurors called as witnesses on the motion for a new trial developed the fact that none of them had heard the radio and television news broadcasts carrying this statement.

Although petitioners claim (Pet. 14) they were prejudiced by the publication of the prosecutor's statement that the confession implicated all of the petitioners, it is hard to see how this can be so, since none of the jurors saw, read, or heard this statement. See *Thiede* v. *Utah Territory*, 159 U. S. 510; *Spies* v. *Illinois*, 123 U. S. 131; *Hopt* v. *Utah*, 120 U. S. 430.[4] Even where jurors have seen newspaper accounts of a trial in which they have participated, they are not necessarily disqualified. *United States* v. *Reid*, 53 U. S. 360, 366; *Bratcher* v. *United States*, 149 F. 2d 742 (C. A. 4), certiorari denied, 325 U. S. 885; *Beard* v. *United States*, 82 F. 2d 837, 844 (C. A. D. C.), certiorari denied, 298 U. S. 655; *Van Riper*

[4] Since Donnelly's confession had already been received in evidence before any publication of the statement was made, he could not be prejudiced by a bare mention of the confession's existence. The claimed error can at most run only as to petitioners Massicot and Lirette.

v. *United States*, 13 F. 2d 961, 967 (C. A. 2), certiorari denied *sub nom Ackerson* v. *United States*, 273 U. S. 702. The test is whether they can consider the evidence impartially. *United States* v. *Reid*, *supra*, *Reining* v. *United States*, 167 F. 2d 362, 365 (C. A. 5), certiorari denied, 335 U. S. 830. *A fortiori*, if the jury members did not read or hear the various accounts of this statement, there can be no prejudice, for prejudice flowing from newspaper and broadcasting reports cannot be assumed. See *Cwach* v. *United States*, 212 F. 2d 520, 531–532 (C. A. 8).

The trial judge ordered the deletion of all references to petitioners Massicot and Lirette from petitioner Donnelly's statement before the statement went to the jury (R. 368–369). He carefully instructed the jury members that they were "to disregard that statement in so far as the guilt or innocence of the other two Defendants now on trial is concerned" (R. 419). During the course of his general instructions the judge told the jury that "[y]ou must take out of your mind anything that you may have heard or read elsewhere than in this Courtroom. You must make certain that every conclusion that you come to results from evidence which you received here in the Jury Box * * *" (R. 462). Later, the judge repeated his earlier instructions limiting petitioner Donnelly's statement (R. 470). It must be presumed that the jurors followed these instructions. *Delli Paoli* v. *United States*, 352 U. S. 232, 242; *Opper* v. *United States*, 348 U. S. 84, 95.

There is no merit in petitioners' argument (Pet. 18) that the jurors could not be questioned after verdict as to whether they had heard the news broadcasts as to the prosecutor's statement. See *United States* v. *Reid, supra,* at 366; *Higgins* v. *United States,* 160 F. 2d 222 (C. A. D. C.), certiorari denied, 331 U. S. 822; cf. *Mattox* v. *United States,* 146 U. S. 140, 147–148. Nor was it improper for the judge to conduct the examination himself. When qualifying prospective jurors the trial judge is entitled personally to conduct the examination and need not permit defense counsel to do so, so long as counsel are permitted to suggest pertinent questions. Rule 24 (a), F. R. Crim. P.; see *Cwach* v. *United States, supra,* 212 F. 2d 520, 531; *Best* v. *United States,* 184 F. 2d 131, 141 (C. A. 1), certiorari denied, 340 U. S. 939; *Murphy* v. *United States,* 7 F. 2d 85, 86 (C. A. 1), certiorari denied, 269 U. S. 584; *Ungerleider* v. *United States,* 5 F. 2d 604, 605 (C. A. 4), certiorari denied, 269 U. S. 574. This situation was essentially the same since here, as on the *voir dire,* the purpose of asking questions was to determine fitness. The trial court gave defense counsel the opportunity to formulate questions to be put to the jurors (R. 494–495). The way was open for petitioners to raise their "contention of bias from the realm of speculation to the realm of fact". *Dennis* v. *United States,* 339 U. S. 162, 168. They did not choose to do so and should not be permitted to complain now.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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